SUPREME COURT
IN THE STATE OF MICHIGAN

DWAYNE WIGFALL,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

Supreme Court No. 156793

Court of Appeals No. 333448

Lower Court No. 15-015620-NO
Judge Daphne Means Curtis

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CITY OF DETROIT'S BRIEF IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE TO THE SUPREME COURT

CITY OF DETROIT LAW DEPARTMENT

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Dated: December 20, 2017

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STATEMENT OF JURISDICTION

Defendant does not disagree that the MCR cited by Plaintiff does allow the Supreme Court to review a case when warranted. Defendant asserts that the Michigan Court of Appeals decision was not clearly erroneous and will not result in manifest injustice. Further, Supreme Court review is not warranted on any other basis that is allowed.

STATEMENT OF QUESTION PRESENTED

I. WHETHER REVIEW IS WARRANTED WHEN THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT'S DENIAL OF SUMMARY DISPOSITION BECAUSE PLAINTIFF FAILED TO COMPLY WITH THE CLEAR STATUTORY REQUIREMENT FOR FILING NOTICE UNDER MCL 691.1404 WHEN PLAINITFF'S NOTICE WAS DEFECTIVE BECAUSE SHE DID NOT TIMELY SERVE AN INDIVIDUAL WHO MAY LAWFULLY BE SERVED WITH CIVIL PROCESS DIRECTED AGAINST A MUNICIPALITY SUCH AS THE CITY OF DETROIT AS THE NOTICE WAS NOT SERVED UPON THE MAYOR, CITY CLERK OR THE CITY ATTORNEY?

The trial court answered,	"No."
The Defendant-Appellant City answers,	"Yes."
The Plaintiff-Appellee will answer,	"No."

II. WHETHER THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT'S DENIAL OF DEFENDANTS' MOTION FOR SUMMARY DISPOSITION BECAUSE PLAINTIFF FAILED AS A MATTER OF LAW TO ESTABLISH A JUSTIFICATION FOR EQUITABLE ESTOPPEL WHEN THE CLEAR LANGUAGE OF THE MCL 691.1901 INFORMED PLAINTIFF WHO TO SERVE AND HOW AND THE CITY'S CLAIMS DEPARTMENT MADE NO REPRESENTIATION ABOUT HOW TO FILE A CLAIM FOR THOSE FILING SUIT UNDER THE HIGHWAY DEFECT EXCEPTION?

The trial court answered,	"No."
The Defendant-Appellant City answers,	"Yes."
The Plaintiff-Appellee will answer,	"No."

SUPREME COURT REVIEW IS NOT WARRANTED

The Court of Appeals did not err as a matter of law in reversing the trial court's denial of summary disposition in this case where Plaintiff must serve notice to the right persons when a municipality is sued involved pursuant to MCL 691.1402. The Court followed the principles of *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197, 219; 731 NW2d 41 (2007); *McCahan v Brennan,* 492 Mich 730; 822 NW2d 747 (2012); *McLean v Dearborn,* 302 Mich App 68; 836 NW2d 916 (2013). Interlocutory review is not warranted. Manifest injustice will not occur by the Court of Appeals decision.

Plaintiff Wigfall filed suit against the City of Detroit under the highway exception of the Governmental Tort Liability Act ("GTLA"), which states that a municipal corporation may be liable for failing to maintain in reasonable repair a sidewalk adjacent to a municipal, county, or state highway when the municipal corporation is aware of a defect. MCL 691.1402a. Plaintiff failed to serve his notice on a proper individual under MCL 691.1404(2). Plaintiff sent notice to the Claims Department of the Law Department. MCL 691.1404 governs the manner in which an injured person must provide notice of an injury and defect as a condition to recovery under the highway exception to the GTLA. The statute provides, in relevant part, the following:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred ... shall serve a notice on the governmental agency of the occurrence of the injury and the defect.
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> • • •
>
> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with

civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding.

Plaintiff's notice was addressed to the "City of Detroit Law Department ,Claims Department" which is not one of the individuals specifically identified in MCR 2.105(G)(2), i.e., "the mayor, the city clerk, or the city attorney of a city," who may "lawfully be served with civil process directed against" the city of Detroit. MCL 691.1404(2). Therefore, plaintiff's notice failed to comply with the requirements of MCL 691.1404(2). Furthermore, MCR 2.105(G) sets forth the requirements for lawful service on "a public, municipal, quasi-municipal, or governmental corporation," and states that service of process may be made upon a city by serving "the mayor, the city clerk, or the city attorney of a city[.]" MCR 2.105(G)(2).

In *McLean v Dearborn*, 302 Mich. App. 68, 78–79; 836 N.W.2d 916 (2013), this Court explained that, reading MCL 691.1404(2) and MCR 2.105(G) together, service on a city must be made by serving one of the three persons specified under MCR 2.105(G)(2), those being the mayor, the city clerk, or the city attorney. See MCR 2.105(G)(2). The *McLean* Court explained that the apparent authority of a recipient other than one of the three individuals listed in MCR 2.105(G)(2) to accept service on behalf of a city is not sufficient under MCL 691.1404(2) unless the recipient is "authorized by *written appointment* or *law* to accept service on behalf of defendant." *McLean*, 302 Mich. App. at 80; MCL 60.1930; MCR 2105(H).

The claims department is not authorized by written appointment or law to accept service on behalf of any of the individuals. MCL 600.1930; MCR 2.105(H). In *Green v City of Detroit*, 87 Mich App 313; 274 NW2d 51 (1978), the court discussed the relevant code then Section 2-2-15, now 2-4-23, which noted "that all claims of whatever kind against the City must be filed in

accordance with the general law of the State applicable to the filing of claims against governmental agencies."

No manifest injustice will result by the decision. The City did not waive compliance with the court rule. Further, the issue of whether the City waived notice by explaining how to file a claim that did not involve a legal suit was never raised by Plaintiff in the trial court or ruled upon by the trial court. Therefore, it is not an issue before this court and should be considered abandoned.

The legislature states the standard for providing notice of a highway defect claim. The City, contrary to Plaintiff's argument, has not waived the requirement to comply with any court rule or the legislative directive as to what constitute service by its statement about generally how to file a claim. *Green v City of Detroit, supra.* As a matter of law, Plaintiff failed to show that the City of Detroit was equitably estopped from asserting that the claim was defective.

Without proper notice, plaintiff cannot assert the highway exception, and defendant remains immune from suit. See *McLean*, 302 Mich. Plaintiff's attorney is charged with knowledge of the law and cannot rely on the City's website or the statement of a general employee on how to file a notice pursuant to MCL 691.1904(4) to prove equitable estoppel. See *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140–41; 602 NW2d 390, 405-06 (1999); *Hughes v Amena Township*, 284 Mich App 50, 78; 771 NW2d 453 (2009).

STATEMENT OF FACTS AND PROCEEDINGS

Plaintiff sued the City of Detroit under the highway defect exception to governmental immunity, MCL 691.1402, for injuries sustained on June 9, 2014 when his motorcycle struck an alleged defect in a City roadway. The notice of the occurrence of injury and defect was sent by certified mailed to:

City of Detroit Law Department – CLAIMS
Coleman A. Young Municipal Center
2 Woodward Avenue, Suite 500
Detroit, MI 48226

(Group Exhibit A.)(Tr. 4/15/2016, pp 4-5).

The notice was received by the law department's claims section on September 22, 2014. On December 3, 2014, the claims section, by Tyrone Butler, sent an acknowledgment that the claim had been filed, and requested that plaintiff supply additional information in order for the claims division to process the claim. Mike Morse's law firm sent additional information to Mr. Butler on January 28, 2015. (Group Exhibit A.)

Plaintiff's lawsuit under the highway defect exception was filed on December 2, 2015.

On January 7, 2016, Defendant City filed Motion for Summary Disposition pursuant to MCR 2.116(C)(7). Defendant asserted that Plaintiff failed to comply with the statutory notice requirement under MCL 691.1404(2) for failing to serve notice on the proper parties when one sues a municipality under the highway defect exception.

The trial court denied the City of Detroit Motion. The court ruled that the Plaintiff substantially complied with the statute (Exhibit B, Opinion). Further, the trial court ruled that the City of Detroit was equitably estopped from denying effective service because Tyrone Butler, a claims section person acknowledged the filing of your claim, (Exhibit B, Opinion p.

5). Second, Attorney Mike Morris law firm had an employee, Julie Rashid to call to ask for instructions on how to file a claim for the proper contact and address to serve notice of a claim of injuries and, a Ms. Tyler, told her what contact and address to use, and she used it. (Exhibit B, Opinion, pages 5-6).

STANDARD OF REVIEW

The City of Detroit's Motion for Summary Disposition was brought pursuant to MCR 2.116(C)(7). This Court reviews a trial court's decision to grant or deny a motion of summary disposition de novo. *Pohutski v Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002). Questions of statutory interpretation are also reviewed de novo. *Nastal v. Henderson & Assoc. Investigations, Inc.*, 471 Mich. 712, 720; 691 NW2d 1 (2005); *In re MCI Telecommunications*, 460 Mich. 396, 413; 596 NW2d 164 (1999).

When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature. The Court begins by construing the language of the statute itself. When the language is unambiguous, the Court gives the words their plain meaning and apply the statute as written. *In re MCI Telecom. Complaint*, 460 Mich. 396, 411, 596 N.W.2d 164 (1999). *Rowland v Washtenaw Co Rd Com'n*, 477 Mich 197, 202; 731 NW2d 41, 45 (2007).

A motion under MCR 2.116(C)(7) may be brought where the claim is barred because of immunity granted by law. *Seldon v Suburban Mobility Authority for Regional Transp*, 297 Mich App 427, 432; 824 NW2d 318 (2012). In reviewing a motion under MCR 2.116(C)(7), an appellate court reviews the pleadings and any documentary evidence submitted in a light most favorable to the nonmoving party to determine whether the nonmoving party has established that it is entitled to governmental immunity. *McGoldrick v Holiday Amusement, Inc.*, 242 Mich App 286, 289; 618 NW2d 985 (2000).

A motion for summary disposition under MCR 2.116 (C)(7) tests whether a claim is barred because of immunity granted by law and requires consideration of all documentary evidence filed or submitted by the parties. *Miller v Lord*, 262 Mich App 640, 643; 686 NW2d 800 (2004).

It is incumbent upon a plaintiff to plead and prove facts to overcome the presumption of governmental immunity: "To survive a motion for summary disposition, [a] plaintiff must allege facts warranting the application of an exception to governmental immunity." *Mack v Detroit*, 467 Mich 186, 198, 199-200; 649 NW2d 47 (2002). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Troy*, 256 Mich App 351, 353, 664 NW2d 269, 271 (2003).

ARGUMENT

I. THE COURT OF APPEALS RIGHTLY APPLIED THE PRINCIPLE OF ROWLAND V WASHTENAW AND REVERSED THE TRIAL COURT'S DENIAL OF THE CITY OF DETROIT SUMMARY DISPOSITION MOTION BECAUSE PLAINTIFF'S CLAIM UNDER THE HIGHWAY DEFECT EXCEPTION TO GOVERNMENTAL IMMUNITY IS BARRED BY HIS FAILURE TO SERVE THE NOTICE REQUIRED BY MCL 691.1404 UPON AN INDIVIDUAL WHO MAY LAWFULLY BE SERVED WITH CIVIL PROCESS DIRECTED AGAINST THE CITY OF DETROIT AND SUBSTANTIAL COMPLIANCE DOES NOT APPLY; THEREFORE THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING SUMMARY DISPOSITION.

The Court of Appeals correctly reversed the trial court erred in denying Defendant City's Motion for Summary Disposition because Plaintiff failed to comply with MCL 691.1404 (1) and (2) statutory notice requirements. Plaintiff Wigfall failed to comply with MCL 691.1404 because he failed to serve the proper persons required to be served pursuant to MCR 2.105(G)(2) when suing a municipality under the highway defect exception.

A. The Service And Notice Requirements For A Claim Under The Highway Defect Exception Must Be Followed Regardless Of Whether The Government Was Prejudiced By A Failure To Follow Straightforward And Clear Notice Requirements and Substantial Compliance Is Not The Standard For Saving A Defective Serving A Defective Notice.

This suit is brought under the highway defect exception to governmental immunity, MCL 691.1402. Under this exception, a plaintiff may recover for bodily injury suffered as a result of a municipality's failure to maintain a highway in reasonable repair so that it is reasonably safe for public travel. In order to bring suit under the highway defect exception, the injured person must serve a notice on the governmental agency in accordance with MCL 691.1404. *Thurman v. Pontiac*, 295 Mich App 381, 385; 819 NW2d 90 (2012).

MCL 691.1404 provides in relevant part:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the

> governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding . . . (emphasis added.)

Notice under MCL 691.1404 need not be provided in any particular form and is sufficient if it is timely and contains the requisite information. *Burise v. City of Pontiac*, 282 Mich. App. 646, 654, 766 N.W.2d 311 (2009). The required information does not have to be contained within the plaintiff's initial notice; it is sufficient if notice served upon the governmental agency within the 120–day period contains the required elements. *Id.*

MCL 691.1404(2) clearly sets forth the requirements for service of notice of a highway defect. "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Sprenger v Bickle*, 302 Mich App 400, 403; 839 NW2d 59 (2013)(citation omitted).

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), the court held that because "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally, suspect . . . we conclude that it must be enforced as written." In *Rowland*, the plaintiff did not serve notice of the highway defect until after the 120 day statutory time period for doing so had expired. The trial court and Court of Appeals denied the defendant's motion for summary disposition, finding that the government suffered no prejudice from the delay. The Supreme Court reversed, holding as follows:

> [T]the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is actually suffered. Conversely, the notice provision is not satisfied if notice is served more than 120

days after the accident even if there is no prejudice. 477 Mich. At 219.

In *McCahan v. Brennan*, 492 Mich. 730, 733; 822 N.W.2d 747 (2012), the Supreme Court held that "*Rowland* applies to all such statutory notice or filing provisions . . . ." *Id.* at 733, 788.

Accordingly, "Statutory notice requirements must be interpreted and enforced as plainly written [and] no judicially created saving construction is permitted to avoid a clear statutory mandate." *McCahan v Brennan*, 492 Mich 730, 733; 822 NW2d 747 (2012). Furthermore, Defendant has no burden to show that Plaintiff's failure to comply with the notice caused "actual prejudice" to Defendant. *Rowland, supra* at 200. *Rowland* explicitly overruled earlier cases that imposed such a requirement, *Id.,* and substantial compliance does not save the Plaintiff's case.

Specifically, in *Rowland*, 477 Mich at 200, the Supreme Court stated:

> We conclude that the plain language of this statute should be enforced as written: notice of the injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury. This Court previously held in *Hobbs v. Michigan State Highway Dep't 398 Mich 90, 96; 247 NW2d 754 (1976)*, and *Brown v Manistee Co Rd Comm, 452 Mich 354, 356-357; 550 NW2d 215 (1996)*, that absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception. Those cases are overruled.

Rather, "[a]s a condition to any recovery … ," it is Plaintiff's obligation to provide notice to Defendant. *Rowland, supra* at 200.

McCahan v Brennan, rejected the argument that substantial compliance may fulfill the statutory requirement for timely and correct notice. In *McCahan,* the University of Michigan asserted that Plaintiff had not timely provided notice of claim. The trial court ruled in favor of the University of Michigan and further ruled that plaintiff's arguments that she had substantially complied with the statute and that defendant suffered no prejudice as a result of any defects in notice failed in light of the specific language of the statute requiring the filing within six months after the accident in order to maintain the claim.

On appeal, the Court of Appeals affirmed. The Court of Appeals majority held that the filing of notice with the Court of Claims is a mandatory statutory requirement. Then, relying on the principles articulated in *Rowland,* the majority rejected plaintiff's argument that substantial compliance or the absence of prejudice to defendant could save plaintiff's claim.

The Supreme Court ordered argument on plaintiff's application for leave to appeal affirmed and held:

> Accordingly, we clarify that *Rowland* applies to similar statutory notice or filing provisions, such as the one at issue in this case. To the extent that caselaw from the Court of Appeals or statements by individual members of this Court imply or provide otherwise, we disavow them as inconsistent with both the statutes that they sought to interpret and the controlling law of this state as articulated in *Rowland.* Courts may not engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with statutory notice requirements. Filing notice outside the statutorily required notice period does not constitute compliance with the statute.

McCahan v Brennan, 492 Mich 730, 746–47; 822 NW2d 747, 755–56 (2012). Thus asserting substantial compliance as an argument to save a defective notice has been rejected.

Most recently, in *Fairley v. Dep't of Corr.*, 497 Mich. 290, 298, 871 N.W.2d 129 reconsideration denied sub nom. *Stone v. Michigan State Police*, 498 Mich. 864, 865 N.W.2d 645 (2015), the Supreme Court held that: (i) an injured driver's unsigned notice of intent was insufficient to maintain a claim against the Michigan Department of Corrections, (ii) defective notice was not required to be pleaded as an affirmative defense; and (iii) notice that failed to demonstrate that it was verified "before an officer authorized to administer oaths" was insufficient to maintain a claim against the state police. *Fairley, supra,* concluded that "when the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain notice requirements that the plaintiff fails to meet, no saving construction—such as requiring a defendant to prove actual prejudice—is allowed." 497 Mich at 298.

B. Plaintiff's Claim Under The Highway Defect Exception To Governmental Liability Is Barred By Failure To Serve Notice Required By MCL 691.1404 Either Personally Or By Mail Upon The Mayor, City Clerk or City Attorney Who Are The Only Individuals Who May Lawfully Be Served With Civil Process Directed Against The City of Detroit.

Before the highway defect exception to Governmental immunity can apply, the plaintiff must timely notify the governmental defendant of his or her claim in accordance with MCL 691.1404(1) by serving the right parties. *Plunkett v Dep't of Transportation*, 286 Mich App 168, 176; 779 NW2d 263 (2009).

It is well established that governmental immunity under the Governmental Tort Liability Act ("GTLA"), MCL 691.1401 et seq., is not an affirmative defense, but is instead a characteristic of government. *Mack v. Detroit*, 467 Mich. 186, 198, 649 N.W.2d 47 (2002). Municipalities are generally immune from tort liability if they are engaged in the exercise or discharge of a governmental function. *Nawrocki v. Macomb Co. Rd Com'n*, 463 Mich. 143, 156; 615 N.W.2d 702 2000). The City has statutory tort immunity under MCL 691.1407(1) unless a claim is pled under one of the six statutory exceptions to immunity, one of which the highway defect exception, MCL 691.1402. "[I]t is the responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions [to governmental immunity]." *Mack, Id.,* at 201.

A defect in the notice required by the GTLA is not an affirmative defense -- rather it is plaintiff's burden to establish that it served notice that complied with the statutory requirements. *Fairley v. Dep't of Corr.*, 497 Mich. 290, 871 N.W.2d 129 reconsideration denied sub nom. *Stone v. Michigan State Police*, 498 Mich. 864, 865 N.W.2d 645 (2015).

The highway defect exception, in plain and unambiguous language, requires that notice be served upon "any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency . . . ." MCL

691.1404(2) (emphasis added).

MCR 2.105(G) provides that service upon a municipal corporation may be made upon the mayor, city clerk or city attorney. In this case, plaintiff's mailed notice was addressed to: "City of Detroit Law Department - CLAIMS." Neither the Law Department nor its Claims Section is an individual. Plaintiff did not, either personally or by certified mail, serve an "individual" who may lawfully be served with process, i.e., the mayor, city clerk or city attorney.[1] Mailing notice to the Law Department's Claim Section does not adhere to the straightforward, clear and unambiguous language of the statute requiring service upon an "individual".

Under Section 7.5-201 of the 2012 Detroit City Charter, the City Attorney for the City of Detroit is the "Corporation Counsel who is the duly authorized and official legal counsel for the City of Detroit and its constituent branches, units and agencies of government. The City of Detroit Law Department is headed by an individual, the Corporation Counsel, Melvin Butch Hollowell.

The Law Department's claims section receives and processes claims against the city under the terms of a city ordinance. (See Exhibit C). Notice sent to the claims section is not a substitute for the notice under MCL 691.1404(2) that must be served on the mayor, city clerk or city attorney. The notice sent to the Law Department's claims section did not comply with the clear and unambiguous language of MCL 691.1404(2) to serve an individual who may [2]be lawfully served

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[1] Neither the City of Detroit, its mayor, city clerk or city attorney, under MCR 2.105(H) or MCL 600.1930, by written appointment or law, has authorized the Law Department or the claims section to receive service of process. Under Section 7.5-201 of the 2012 Detroit City Charter, the city attorney for the City of Detroit is the "Corporation Counsel" who is the "duly authorized and official legal counsel for the City of Detroit and its constituent branches, units and agencies of government." The City of Detroit Law Department is headed by an individual, the Corporation Counsel, who at the time in question and today is Melvin Butch Hollowell.

[2] *Brooke v Brooke*, 272 Mich 627, 630; 262 NW 426, 427 (1935), held that where a statute provided that "service of process may be made ... against cities upon the mayor, city clerk, or city attorney," the word "may" was not intended as permissive but rather "to designate those upon

with civil process. Nothing in the City Charter or City Code authorizes the Law Department or its claims section to accept service of process for the City.

The outcome in this case is controlled by *McLean v. Dearborn*, 302 Mich. App. 68, 836 N.W.2d 916 (2013) where the Court of Appeals reversed the trial court's denial of summary disposition and held that service of a highway defect notice on the City of Dearborn's TPA (third party administrator) did not satisfy MCL 691.1404(2). In *McClean*, the plaintiff's initial highway defect notice was served on the Dearborn city attorney, but it was incomplete. Plaintiff served a second notice within the 120 day period that cured the defects in the first notice, but she did not serve that second notice upon the city attorney. Finding that the combined notices were defective, the *McLean* court explained:

> Having determined that the initial notice to defendant was insufficient, we now determine whether the defect was cured by plaintiff's subsequent communication to defendant's TPA. Plaintiff is correct that all the information required by MCL 691.1404(1) does not have to be contained within the plaintiff's initial notice; it is sufficient if a notice received by the governmental agency within the 120–day period contains all the required elements. *Burise*, 282 Mich. App. at 654, 766 N.W.2d 311. However, we disagree that plaintiff's letter to Broadspire can be considered "notice" to defendant under MCL 691.1404(2). The statute provides that "notice may be served upon any individual ... who may lawfully be served with civil process directed against the government agency...." *Id.* MCR 2.105(G)(2) provides that service of process may be made on "the mayor, the city clerk, or the city attorney of a city." By the plain language of this statute and court rule, service on a TPA is not sufficient. Judicial construction of MCL 691.1404 is not permitted. *Rowland*, 477 Mich. at 219, 731 N.W.2d 41.
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> 302 Mich App. at 78-79.

The *McLean* court rejected plaintiff's waiver argument and the argument that she could serve someone other than the city attorney where she offered no evidence that the city attorney had appointed anyone to accept service on his behalf under MCR 2.105(H)(1). *McLean* explained:

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whom service should be made and no other." *Id.* The court reasoned that "[a]ny other construction in the light of the multitude of officers and employees required to operate a complex modern municipal government would be illogical." *Id.*

> We see no great injustice in requiring plaintiffs seeking to provide notice to defendant under the statute to serve their notices on the correct parties. Although plaintiff asserts that there "should be no requirement that the supplemental notice be served upon the same cast of persons as identified in MCR 2.105(G)," we are not in a position to re-write the statute or the court rule. We reiterate that our Supreme Court has found this notice provision to be both constitutional and unambiguous. *Rowland*, 477 Mich. at 219, 731 N.W.2d 41.
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> *McLean, supra* at 81.

The trial judge erred in ruling there was substantial compliance to justify ruling that Plaintiff provided timely and proper notice. Notice must be made in accordance with the statute and case law. (Exhibit B, pp 516). The judge's decision is in contravention of the Supreme Court decision of *Rowland, supra* and the *McLean, supra* decision which has established that substantial compliance does not negate the City's immunity or satisfy the statutory requirements of providing timely notice.

"All claims of whatever kind against the city must be filed in accordance with the general law of the state applicable to the filing of claims against governmental agencies; otherwise no claim for money or damages may be brought against the city." See *Green v City of Detroit*, 87 Mich App. 313; 274 NW2d 51 (1978) (holding that ordinance for filing claims with the City of Detroit did not free a claimant of the duty to give statutory notice complying with MCL 691.1404).

The Claims Section acknowledgment of receipt of plaintiff's claim (on December 3, 2014) and plaintiff's counsel supplied additional information to the claims section on January 28, 2015 does not negate Plaintiff's failure to serve the proper person in a timely manner. First of all, both of those communications were well past the 120 day time period for notice under MCL 691.1404(1). More importantly, acknowledging a claim, under the City's claims ordinance, is no substitute for the statutory notice required by MCL 691.1404(2). The City's claims ordinance at section 2-4-23 (Exhibit C) specifically provides that filing notice of a claim does not excuse compliance with state law notice requirements (MCL 691.1404 is specifically referenced in that

code section). The claims ordinance does not appoint the claims section or law department to receive the notice required by state law. *McClean, supra,* rejected a similar argument regarding notice to and communications with Dearborn's claims administrator, holding that there was no great injustice in requiring plaintiffs seeking to provide notice to defendants under the statute to serve their notices on the correct parties. 302 Mich App at 81.

Plaintiff's argument at the trial court's determination that Plaintiff complied with the statute is substantially without merit. (Tr 4/15/2016, pp5-6). Not only must a Plaintiff file within 120 days but one must properly serve the right parties and substantial compliance, which we assert there was none, does not excuse the failure to do so under *Rowland, supra* and *McLean, supra. McCahan* established that the argument that substantial compliance save the notice must be rejected.

Accordingly, any argument by Plaintiff that service of notice on the City of Detroit Law Department's Claims Section substantially complied with the MCL 691.1404(2) which requires personal or certified mail service on the mayor, city clerk or city attorney is without merit. Plaintiff misstates the law that the way you serve an individual who represents the City is at the usual place of business. No case supports that proposition. To the contrary, this case is controlled by *McLean v. Dearborn, supra* 302 Mich. App. 68, 836 N.W.2d 916 (2013) where the Court of Appeals reversed the trial court's denial of summary disposition and held that service of a highway defect notice on the City of Dearborn's claims administrator (its "TPA" or third party administrator) did not satisfy MCL 691.1404(2).

Plaintiff cannot distinguish this case from the binding precedent of *McLean* on the ground that it involved a second notice served within the 120 day time period, where this case involves only one notice. The distinction drawn has no bearing on the rule of law -- i.e., that service must be made upon the requisite individual. In *McLean*, the first notice was defective in scope, which

case law allows to be cured by supplemental notice served within the statutory time period. Because the supplemental notice was not served on the city attorney, it did not matter that the initial notice was served on the city attorney. Simply put, there must be a notice, singularly or collectively, meeting all of the statutory requirements, which is served on the mayor, city clerk or city attorney. This is not a matter of strict construction, but rather application of the plain, straightforward words used by our legislature.

There is only one notice in this case, and it was not served on any individual upon whom civil process may be directed. The letter plaintiff mailed in this case, does not name or even refer to the mayor, city clerk or city attorney.

The *McLean* court expressed its sympathy with plaintiff's position, and was troubled by the fact plaintiff was penalized for doing what was requested by the City of Dearborn's TPA – that Plaintiff provide additional information -- only to determine later that plaintiff should have sent the information to a person who may lawfully be served with civil process. But that sympathy was offset by, and had to yield to, the presumption that plaintiff knows the law and that the statute was clear and unambiguous. *McLean* concluded by stating "[t]hat our decision is therefore compelled by the plain language of the statute and court rule, without regard to our sympathies." 302 Mich App at 81 fn 6.

Civil process on a municipal corporation is to be served upon "the mayor, the city clerk or the city attorney of a city." MCR 2.105(G)(2). In this case, plaintiff served notice by certified mail upon the "City of Detroit Law Department - CLAIMS" at 2 Woodard Avenue, Suite 500. Mailing notice to the law department's claims section undoubtedly did not adhere to the straightforward, clear, unambiguous language of the statute requiring service upon an "individual" . . . who may lawfully be served with civil process directed against the governmental agency." No judicially created saving construction is permitted to avoid this clear statutory mandate. See,

McCahan v Brennan, 492 Mich 730, 733, 822 NW2d 747 (2012).

The Court of Appeals has reversed the circuit court's denial of summary disposition because service of a highway defect notice by regular mail addressed to the City's law department did not comply with MCL 691.1404(2) in two unpublished cases. *Withers v City of Detroit*, unpublished per curiam opinion, Court of Appeals No. 324009 p. 3 2016WL 683125 (February 18, 2016) (Exhibit D), *Withers* held that "[t]he law department is not 'an individual' and thus does not constitute an entity that 'may be lawfully served with civil process against' the city." *Withers* rejected the argument that "substantial compliance" excused plaintiff's failure to comply with MCL 691.1404(2), noting that our Supreme Court has soundly rejected the proposition that substantial compliance can substitute for exact adherence to the statutory words. *Id.* See *Darlene Powell v City of Detroit,* unpublished per curiam opinion, Court of Appeals No. 332267 (August 8, 2017), (law department is not an individual and service was defective) (Exhibit E).

The letter was not served or delivered to the City Attorney who is Melvin Hollowell, Corporation Counsel for the City of Detroit, or Mayor or the City Clerk. The claims section does not and cannot serve as a way to subvert proper service. The Plaintiff's through their attorney who is expected to know the law, cannot evade, avoid or subvert a clear Michigan Court Rule or ignore compliance with the clear language of the statute.

II. THE CITY IS NOT EQUITABLY ESTOPPED FROM DENYING PLAINTIFF"S FAILURE TO SERVE THE PROPER PERSON.

Plaintiff argues that the City is estopped from raising plaintiff's undisputed failure to serve notice on an individual upon whom service of civil process may be made, by having relied upon the City's website and a representation by an employee in the Claims Section to send the notice to the Claims section of the law department. Plaintiff offered the affidavit of an employee of the Mike Morse Law Firm which states that she spoke with an employee in the claims section and

asked where to serve notice of a claim for injuries.

Plaintiff never raised the issue that the Corporation Counsel waived compliance with the court rule by publishing how to file a claim on the City's website. This argument must be rejected because it was not raised below, was not considered by the trial court and is therefore waived. Plaintiff only relied upon the argument of equitable estoppel in the trial court which is a separate issue.

Plaintiff's equitable estoppel argument is without merit because the city has clearly stated that persons must follow the law in filing notice claim pursuant to a statute or law. Plaintiff is charged with knowledge of the law, yet chooses to ignore the express language of the City's claims ordinance (Exhibit C) which warns:

> All claims of whatever kind against the city must be filed in accordance with the general law of the state applicable to the filing of claims against governmental agencies; otherwise no claim for money or damages may be brought against the city. 1984 Detroit Code Sec. 2-4-23.

See *Green v City of Detroit*, 87 Mich App. 313; 274 NW2d 51 (1978) (holding that ordinance for filing claims with the City of Detroit did not free a claimant of the duty to give statutory notice complying with MCL 691.1404).

While no employee has done anything wrong, assuming arguendo they did, a municipality or its agents cannot be estopped by acts of its officers or agents in violation of the law. *Fass v. City of Highland Park*, 326 Mich 19; 39 NW2d 336 (1949). A municipality is not precluded from enforcing its laws by the fact that an employee exceeded its authority in issuing a permit. The city cannot be estopped in the discharge of governmental function through its public officers when the legislature and the Michigan Court Rules have established the law of how to provide notice for filing a highway defect claim. *Id* at 29. Defendant City does not have a duty to inform Plaintiff's Counsel about filing a lawsuit against the City under the governmental immunity statute and

cannot be estopped from enforcing the law. See *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140–41; 602 NW2d 390, 405–06 (1999); *Fass v City of Highland Park, supra.*

Moreover, the City cannot alter the law of governmental immunity to allow for an alternate form of service by putting information on the website for general claims. The website was to inform persons who are filing claims short of judicial intervention and claims in general. Everyone dealing with a municipality and its agents are charged with knowledge of the provision of lawfully adopted ordinances. *Hughes v Amena Township*, 284 Mich App 50, 78; 771 NW2d 453 (2009). Plaintiff's argument of waiver, although waived by Plaintiff, should be rejected because the City clearly states that one must comply with the law of the State. Just as the City cannot by charter create a cause of action not provided for in the GTLA, it cannot change the legislative's notice requirements. See, *Mack v. City of Detroit,* 467 Mich. 186, 196, 649 N.W.2d 47, 53 (2002).

Plaintiff has not offered a case that supports its contention that service of a notice of claim based on a website will support a claim of estoppel with respect to the notice requirement of the GTLA and in light of the City's Ordinance.

The closest parallel would be the application of estoppel where service is not made before the statute of limitations expires. In *Tucker v Eaton*, 426 Mich 179, 393 NW2d 827 (1986), the Supreme Court reversed the Court of Appeals determination that the City of Detroit was estopped from denying service of process where there was no indication that plaintiff was misled by any representation or concealment of fact. "[T]o justify the application of estoppel, one must establish that there has been a false representation or concealment of material fact, coupled with an expectation that the other party will rely upon this conduct, and knowledge of the actual facts in the part of the representing or concealing party." *Tucker,* at 188, citing *Lothian v Detroit*, 414 Mich 160, 177, 324 NW2d 9 (1982).

As noted above, plaintiff's lawyer's employee was correctly told where to mail a notice of

claim -- to the City's claims section. No representation was made that doing so satisfied the statutory notice requirement for a highway defect claim. Any person can file a claim for any alleged loss under the City's claims ordinance, but as the ordinance plainly states, filing a claim is not a substitute for complying with the statutory notice required by the legislature and the law -- a fact of which plaintiff and her attorneys are charged with knowledge. Ms. Tyler, who is not an attorney (who no longer is employed by the City or its claims section), made no representation, nor was she authorized to do so, that service of a claim on the claims section would substitute for service required by state law.

The Claims department or the department in general does not have any authority by law or by written authority to accept service for the Mayor or corporation counsel which is clear from MCR 2.105(H); MCL 600.1930. The City did not represent that the claims section was a person upon who could lawfully be served with civil process. Plaintiff's agent was told where a claim could be filed, and nothing more. The facts presented come nowhere near that required to establish equitable estoppel.

Plaintiff has failed to satisfy the elements for application of the equitable estoppel doctrine. Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140–41; 602 NW2d 390, 405-06 (1999); *West American Ins. Co. v. Meridian Mut. Ins. Co.*, 230 Mich App 305, 309-310, 583 NW2d 548 (1998).

Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *Id.*, at 310, 583 N.W.2d 548. Here, Plaintiff's equitable estoppel

theory is predicated on Defendant's alleged failure to inform Plaintiff how to serve the City statutory notice under the defective highway exception to governmental immunity or for telling the public how to file a claim in general on the website coupled with telling Plaintiff's law firm's employee "how to file notice." Silence or inaction may form the basis for an equitable estoppel only where the silent party had a duty or obligation to speak or take action. *Id.* Plaintiff's counsel has failed to show that Defendant had a duty to advise the Plaintiff the proper way to provide notice and to serve the proper parties by law and under the Michigan Court Rules. Plaintiff is charged with knowledge of the law and is represented by counsel. Defendant City does not have a duty to inform Plaintiff's Counsel about filing a lawsuit against the City. See *Conagra, Inc,* 237 Mich App at 140–41.

Plaintiff did not and cannot establish a good faith reliance upon the City of Detroit's website or representation of the City employee. Everyone dealing with a municipality and its agents are charged with knowledge of the provision of the lawfully adopted statutes and ordinances. *Hughes,* 284 Mich App at 78. Counsel is charged with knowledge of the law. Hence, Plaintiff's estoppel argument must fail as a matter of law.

CONCLUSION

As the cases discussed above make abundantly clear, service of a highway defect notice must comply with the plain and straightforward requirements that the Legislature included in MCL 691.1404. Because the Plaintiff in this case did not comply with the statute and serve notice upon the mayor, city clerk, or city attorney (corporation counsel), his suit against the City of Detroit under the highway defect exception is barred by governmental immunity. The Court of Appeals properly applied the law to this case and reversed the decision of the trial court.

Respectfully submitted,

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